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Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1982

Edwin Hoggard ..... *Petitioner*

VS.

The State of Arkansas ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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QUESTIONS PRESENTED

The Questions Presented are:

1. Whether the Supreme Court of Arkansas erred in holding and deciding that the search warrant and the search conducted thereunder were legal?

A. Whether the State of Arkansas should be permitted to search an individual's apartment based on an affidavit founded on an alleged constitutional law that appellant asserts is repugnant to the 1st, 4th and 14th Amendments to the United States Constitution?

B. Whether the State of Arkansas should be permitted to use material seized pursuant to said law to try petitioner on another matter, sidestepping the illegality of the search by opting not to prosecute under the same statute?

C. Whether a search warrant issued by a magistrate authorizing a nighttime search of premises for violations of possession of obscene material, founded on a hearsay affidavit of a prosecuting attorney based on the unrecorded statement of a six year old boy and his mother, is repugnant to the due process clause of the U.S. Constitution?

D. Whether the State erred by ruling a nighttime search was appropriate and which did not rule on the failure of the State to comply with Ark. Rules of Criminal Procedure Rule 13.6?

2. Whether the Supreme Court of Arkansas erred in applying the "Wicks rule" against the petitioner but permitted the State of Arkansas to raise on appeal issues not raised at the trial level as being a violation of the equal

protection of the laws guarantee? (*Wicks v State*, 270 Ark. 781).

3. Whether the Supreme Court erred in upholding the Arkansas Discovery Rules as not being violative of Due Process guarantees? (Ark. Stats. Sec. 43-801).

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas entered in the above case on October 4, 1982 and on which rehearing was denied November 8, 1982.

REPORT OF OPINION OF COURT BELOW

The opinion of the Arkansas Supreme Court in this case is officially reported in 277 Ark. 177 and a copy thereof along with the dissenting opinion is appended to this Petition.

CONCISE STATEMENT OF GROUNDS OF THIS COURT'S JURISDICTION

This was a criminal proceeding brought by the State of Arkansas charging the appellant with a felony, rape in violation of Arkansas Criminal Code Section 41-1803, Acts of Arkansas 1975, No. 280, p. 500. Evidence was submitted in this case which was obtained pursuant to a search warrant seizure based on an alleged violation of the Arkansas Obscenity Law, Section 41-3565 (2).

The judgment of affirmance by the Supreme Court of Arkansas sought to be reviewed was dated and filed October 4, 1982 and an Order denying a rehearing was dated and filed in the Supreme Court of Arkansas November 8, 1982.

Jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

The validity of a statute of Arkansas is involved in this petition. The Arkansas Obscenity Law, Section 41 3565 (2), states:

> "Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter or materials, other than mailable matter known by such person to have been . . . shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000.00 or be imprisoned in the county jail for a period not to exceed one year, or both."

Cases believed to sustain this petition are *Smith v. California*, 261 U.S. 147 (80 S.Ct. 215), *Redrup v. N.Y., Austin v. Ky and Gent v. Arkansas*, 386 U.S. 767 (87 S.Ct. 1414) *Stanley v. Georgia*, 394 U.S. 557, *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 91 S.Ct. 1400 and *Steagald v. United States*, 451 U.S. 204 (101 S.Ct. 1642) and *Wardius v. Oregon*, 412 U.S. 470.

CONCISE STATEMENT OF THE CASE

The petitioner was charged with the offense of rape, violation of Ark. Stat. Ann. Section 41-1803, two counts by information filed by the State of Arkansas. (R. 2)

A search of petitioners apartment was made after the deputy prosecuting attorney signed an affidavit presenting testimony to a magistrate of allegations concerning deviate sexual activity between petitioner and a six year old boy after the six year old boy advised the prosecutor that petitioner possessed materials in his apartment that violated the Arkansas Obscenity law and a nighttime search was conducted after the child's mother provided information that petitioner would be going to his parents home for a visit the next day. (R. 4-6, set out in appellants brief pps. 6-12) Forty-three rolls of film, two boxes of slides, a viewer, small booklets, hardback books, photographs and miscellaneous other items were seized in the nighttime search. (R. 6) Only one item was admitted into evidence in the trial of this case. (R. 1286)

Several pre-trial hearings were had in this case after appropriate defense Motions had been filed. These include a Motion to Suppress Evidence obtained in the search based upon a state statute that prohibits the possession of obscene materials. (R. 25) Objection was made based on the 1st, 4th and 14th Amendments to the U.S. Constitution and Article 2 of the Arkansas Constitution as well as a Motion to Exclude being filed as being not admissible even though the trial court had denied the Motion to Suppress. (R. 118, 110)

Petitioner further requested to take discovery depositions of the State's witnesses including the alleged victim and his mother. (R. 18-19) The trial Court denied this Motion. (R. 64)

The petitioner had further alleged as grounds for suppressing the evidence that the hearsay affidavit was

based on the sworn yet unrecorded statement made outside the presence of the magistrate of a six year old child not previously determined to be competent by anyone; that there was no probable cause for its issuance; that compliance with grounds for a nighttime search were not met and Criminal Rule 13.6 dealing with seizure of obscene material was not complied with. All of the above grounds were overruled by the trial court. (R. 775-791)

A trial began July 9, 1981 and a mistrial declared due to the child being ill that day. (R. 795)

The second trial began July 29, 1981 and ended July 31, 1981. The Court directed a verdict in favor of petitioner at the end of the State's case and the other count went to the jury on July 31 with the jury returning a verdict of guilty and a sentence of 10 years and a $7500.00 fine was imposed. (R. 192)

Notice of appeal to the Supreme Court of Arkansas was filed August 3, 1981 by petitioner (R. 194) and a jurisdictional statement was filed February 25, 1982, asserting the constitutionality of the Arkansas Obscenity Law as basis for appellate jurisdiction in that court.

The petitioner enumerated as error the overruling of the Motion to Suppress evidence (Point I, A-D), the introduction of the item seized pursuant thereto (Point VI) and the denial of the Motion to depose state's witnesses (Point II).

The decision of the Supreme Court of Arkansas affirming the trial court's decision on these issues was rendered October 4, 1982 and appears at 277 Ark. 177. A Petition for Rehearing was filed by petitioner and denied November 8, 1982 and is attached in this appendix.

REASONS FOR GRANTING THE WRIT:

The Court below dealt with important questions of law inconsistent with provisions of the United States Constitution.

I.

The Supreme Court of Arkansas held that the search warrant was based on probable cause despite the fact that the warrant was issued on a hearsay affidavit. Petitioner contends that the search warrant did not meet the requirements previously set forth by this Court in *Jones v. United States*, 362 U.S. 257 (80 S.Ct. 725) holding that reasonable cause may not be established by conclusionary statements. The affidavit for search warrant stated "*It is feared* that he *may leave with* some or all of the above described evidence and *may be* packing it up tonight." (R. 5, p. 11 Appellants brief) In this case the testimony of the six year old boy and the statement of his mother contained in the affidavit of the prosecutor were not recorded and they did not appear before the magistrate. Petitioner submits that such does not comply with the tests required in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *U.S. v. Hunley*, 567 F.2d 822.

A. The search warrant is based on possession of the goods seized being a violation of the Arkansas Obscenity Law, Section 43-3565 (2). Petitioner submits that this statute and the search warrant based upon it violate the 1st and 4th Amendments to the Constitution and the 14th Amendment requires it to be applied to the States. Similar statutes have been held to be unconstitutional *Smith v. California*, 361 U.S. 147, *Marcus v. Search Warrants of Property*, 367 U.S. 717, *Stanley v. Georgia*, 394 U.S. 557 (1969) and *United States v. Thirty Seven Photographs*, 402 U.S. 363 (1971).

The Petitioner alleged that the Warrant was illegal and that items were seized which the right to possess is constitutionally protected.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment Four of the United States Constitution.

B. The Supreme Court of Arkansas in its opinion, page 2 states that appellant has no standing on which to raise the issue of constitutionality of this Statute.

The petitioner was not charged with violation of the Arkansas Obscenity Statute, and thus the State argued for the first time on appeal that petitioner had no standing to raise this point. (Page i, ii, 1-2 Appellee's brief). Petitioner submits that he has the right to question the legality of this statute since the invasion of his apartment was invaded by the State. *Jones v. U.S.*, supra. The Supreme Court of Arkansas admits the rights were prejudiced by the seizure of this item, Opinion page 7. Petitioner submits that the following cases sustain issue raised by petitioner and it was error to permit State to raise standing for the first time on appeal. *Sweeney v. Sweeney*, 267 Ark. 595, *Steagald v. U.S.*, 451 U.S. 204 (101 S.Ct. 1642)?

C. Arkansas Rules of Criminal Procedure, Rule 13.2 provides that search warrants shall be executed between six a.m. and eight p.m. unless (ii) the objects to be seized are in danger of imminent removal". (Set forth in appendix)

The Supreme Court held that there was reason to believe the goods were in imminent removal danger and

thus upheld this argument. (Page of Opinion 2) The Dissenting Opinion states that the night time search was not proper because the affidavit stated that the goods were there every time he visited and thus did not uphold the contention that they were in danger of imminent removal. (Dis. Op P. 1-2)

D. Rule 13.6, Arkansas Rules of Criminal Procedure states that the officers serving a search warrant based on the Arkansas Obscenity Law shall seize "Only such instruments or copies thereof as are reasonable necessary for evidentiary use in a proceeding to determine whether the content of such instruments is constitutionally protected . . . " As noted in the Dissenting opinion, (bottom line of page 2—page 3) ninety-nine percent of the material seized was not introduced into evidence although it had all been presented to the judge and possibly was present even though not introduced in front of the jury. The one book which was introduced was used in closing arguments and further prejudiced petitioners rights. The Arkansas Supreme Court has established, contrary to Federal Rule 53(b), that an alleged error will not be considered on appeal if not first presented to the trial court. *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

Petitioner had raised on appeal the interpretation of the rape statute that petitioner was convicted of violating. That is he had raised the issue of vagueness of the definition of the term deviate sexual activity for the first time on appeal. The Supreme Court refused to consider this point for reversal based on the *Wicks* rule. (See opinion 7-8) Respondent raised for the first time the issue of standing on appeal and even permitted petitioner to raise same as the basis for Supreme Court jurisdiction rather than Court of Appeals jurisdiction in the State of Arkansas. (Appellee's brief i, ii, Point I)

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

> citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment 14, United States Constitution.

The Supreme Court has previously decided that the issue of standing cannot be raised for the first time on appeal. *Steagald v. United States*, supra. Further to enforce this requirement against a defendant yet permit a state to raise as a ground for affirmance something not raised at the lower court level is a denial of the equal protection clause of the 14th amendment to the United States Constitution.

Arkansas Discovery Rules in General are set forth in Arkansas Rules of Criminal Procedure, Rule 17.1 et seq. However, an imbalance of discovery procedure appears by virtue of Section 43-801, Ark. Stats. Ann. which provides:

> "The prosecuting attorneys and their deputies shall have the authority to issue subpoenas in all criminal matters they are investigating; and shall have authority to administer oaths for the purpose of taking the testimony of witnesses subpoenaed before there; such oath when administered by the prosecuting attorney or his deputy shall have the same effect as if administered by the foreman of the grand jury."

Criminal sanctions are imposed for failure to comply with the subpoena. A defendant is not permitted the same right under the laws of Arkansas and petitioner submits that by existence of this statute and the complete lack of similar discovery rights for a defendant violates the due process principles and rights announced in *Wardius v.*

Oregon, 412 U.S. 470 (1973). The Court stated that in criminal proceedings discovery must be a "two-way street", 412 U.S. at 475. The discovery imbalance existed in statutory scheme as well as in the operation of the rules of this case.

These statutes offend the Federal constitution and similar discovery such as that requested should have been granted.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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